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28
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

29
30 TECHNOLOGY PROPERTIES LIMITED
31 LLC and MCM PORTFOLIO LLC,

32 Plaintiffs,
33 v.

34 CANON, INC., et al.,

35 Defendants.

36 Case No. 4:14-cv-03640-CW

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1 2 3 4 5 6 7 <p>TECHNOLOGY PROPERTIES LIMITED LLC and MCM PORTFOLIO LLC, Plaintiffs, v. HEWLETT-PACKARD COMPANY, Defendant.</p>	Case No. 4:14-cv-03643-CW DEFENDANTS' MOTION FOR LEAVE TO AMEND INVALIDITY CONTENTIONS Date: December 1, 2015 Time: 2:30 PM Courtroom: Courtroom 2 – 4th Floor Judge: Hon. Claudia Wilken
8 9 10 11 12 13 14 <p>TECHNOLOGY PROPERTIES LIMITED LLC and MCM PORTFOLIO LLC, Plaintiffs, v. NEWEGG INC., et al., Defendants.</p>	Case No. 4:14-cv-03645-CW DEFENDANTS' MOTION FOR LEAVE TO AMEND INVALIDITY CONTENTIONS Date: December 1, 2015 Time: 2:30 PM Courtroom: Courtroom 2 – 4th Floor Judge: Hon. Claudia Wilken
15 16 17 18 19 20 21 <p>TECHNOLOGY PROPERTIES LIMITED LLC and MCM PORTFOLIO LLC, Plaintiffs, v. SEIKO EPSON CORPORATION., et al., Defendants.</p>	Case No. 4:14-cv-03646-CW DEFENDANTS' MOTION FOR LEAVE TO AMEND INVALIDITY CONTENTIONS Date: December 1, 2015 Time: 2:30 PM Courtroom: Courtroom 2 – 4th Floor Judge: Hon. Claudia Wilken
22 23 24 25 26 27 28	2 <p>DEFENDANTS' MOTION FOR LEAVE TO AMEND INVALIDITY CONTENTIONS Case Nos. 14-cv-3640, 14-cv-3643, 14-cv-3645, and 14-cv-3646</p>

1

NOTICE OF MOTION AND HEARING

2 Please take notice that on December 1, 2015, at 2:30 PM, or as soon thereafter as it may
 3 be heard, in Courtroom 2– 4th floor before the Honorable Claudia Wilken, Defendants Canon
 4 Inc.; Canon U.S.A., Inc.; Newegg Inc.; Rosewill Inc.; Seiko Epson Corporation; Epson America,
 5 Inc.; and Hewlett-Packard Company (“HP”) (collectively, “Defendants”) will and hereby do
 6 move this Court pursuant to Patent L.R. 3-6 for leave to amend Defendants’ invalidity
 7 contentions. Defendants served their initial invalidity contentions on January 16, 2015. This
 8 motion is based on this Notice of Motion, the following Points and Authorities, and such other
 9 materials or oral argument as the Court may permit.

10

STATEMENT OF RELIEF SOUGHT

11 Defendants request leave to amend their invalidity contentions to include: (1) three newly
 12 discovered invalidating prior art references recently obtained from third party SanDisk
 13 Corporation (“SanDisk”); and (2) two new written description and enablement challenges to
 14 claims 1, 3, 4, 7, 9, 11, 12, and 14 of U.S. Patent No. 7,295,443 (the ’443 patent), claims 25, 26,
 15 28, and 29 of U.S. Patent No. 7,522,424 (the ’424 Patent), and claims 1-3 of U.S. Patent No.
 16 7,719,847 (the ’847 patent) in view of this Court’s recent claim construction order.

17

POINTS AND AUTHORITIES

18

I. INTRODUCTION

19 Defendants seek to amend their invalidity contentions to include invalidity challenges
 20 based on three prior art references that were recently discovered as a result of documents and
 21 testimony produced by third-party SanDisk in response to a subpoena served by defendant HP.
 22 Those three references include two documents, the SD Specification version 0.9 and the SD
 23 Simplified Specification version 0.9, and one SanDisk product, the SDDR-33. None of these
 24 references were known by the Defendants when they served their initial invalidity contentions in
 25 January 2015, despite earlier searches in which more than 30 relevant references were uncovered.
 26 The three new SanDisk references are highly relevant to the issues because each anticipates
 27 and/or renders obvious every asserted claim in this case.

1 Defendants also seek to amend their contentions to include written description and
 2 enablement challenges to all asserted claims based on claim terms for which the Court's
 3 construction differed from Defendants' proposal. These new lack of written description and
 4 enablement challenges only arose in view of the Court's claim construction Order.

5 Further, as explained below, Defendants have acted diligently in seeking to amend their
 6 contentions, and Plaintiffs will not be prejudiced at this stage of the proceedings by allowing
 7 Defendants to amend. Defendants' motion for leave to amend its invalidity contentions therefore
 8 should be granted. Defendants met and conferred with the Plaintiffs regarding this motion, and
 9 Plaintiffs stated that they reserve the right to oppose.

10 **II. FACTUAL BACKGROUND**

11 This case was transferred to this Court from the Eastern District of Texas in August 2014.
 12 At the initial case management conference held in November 2014, the parties requested – and
 13 the Court ordered – an early claim construction hearing. In January 2015, Defendants served
 14 their initial joint invalidity contentions. The claim construction hearing was held in June 2015,
 15 and the Court issued its order construing disputed terms on September 18, 2015.

16 In the meantime, on June 9, 2015, HP served a subpoena on SanDisk seeking documents
 17 and a deposition relating to potential new prior art for Defendants' invalidity defenses. In
 18 response to the subpoena, SanDisk produced documents on a rolling basis between July 10 and
 19 October 1, 2015. Within these documents, Defendants discovered three potential new prior art
 20 references: the SD Specification version 0.9 (Exhibit B), the SD Simplified Specification version
 21 0.9 (Exhibit C), and a print-out showing sales of a SanDisk SDDR-33 product (Exhibit D).
 22 Additional facts concerning these three references were provided by SanDisk's Rule 30(b)(6)
 23 witness, whom HP deposed on October 7.¹

24 After completing the deposition of SanDisk, Defendants notified Plaintiffs of their
 25 intention to amend their invalidity contentions based on the three newly-discovered prior art

27 ¹ Although the SanDisk deposition was originally noticed for July 23, it was rescheduled
 28 twice—first to August 10 and then to October 7—at Plaintiffs' counsel's request to accommodate
 their schedule.

1 references and the Court's claim constructions. Thereafter, Defendants provided Plaintiffs with a
 2 redline draft of their proposed amended invalidity contentions (Exhibit A) and new invalidity
 3 claims charts for the three prior art references (Exhibits E1-E3, F1-F3, and G1-G3). Defendants
 4 then promptly filed the instant motion.

5 **III. LEGAL STANDARDS**

6 This Court may grant leave to amend invalidity contentions "upon a timely showing of
 7 good cause." Patent L.R. 3-6. Circumstances that may warrant a finding of good cause include
 8 "[a] claim construction by the Court different from that proposed by the party seeking
 9 amendment," and "[r]ecent discovery of material, prior art despite earlier diligent search." *Id.* In
 10 determining whether good cause exists, courts consider (1) whether the moving party acted with
 11 diligence in amending its contentions and (2) whether the non-moving party will be prejudiced if
 12 leave to amend is granted. *Verinata Health, Inc. v. Ariosa Diagnostics, Inc.*, No. C12-05501,
 13 2014 U.S. Dist. LEXIS 57519, *5 (N.D. Cal. Apr. 23, 2014) (citing *O2 Micro Int'l Ltd. v.*
 14 *Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1363, 1368 (Fed. Cir. 2006)).

15 **IV. ARGUMENT**

16 **A. Good Cause Exists to Add the SanDisk Prior Art.**

17 1. Defendants have been diligent in seeking the prior art from SanDisk and
 18 amending their invalidity contentions.

19 Plaintiffs' infringement claims are directed to universal flash memory card readers that
 20 can interface with MMC cards and SD cards in a common slot. The MMC cards and related
 21 specifications were developed by a company called SanDisk, while the SD cards and related
 22 specifications were developed by the SD Group, which included representatives from SanDisk,
 23 Toshiba, and Panasonic. Believing SanDisk might possess information relevant to Defendants'
 24 invalidity defenses, HP served a subpoena on SanDisk on June 9, 2015, seeking documents and a
 25 deposition related to potential prior art. In response to the subpoena, SanDisk produced
 26 documents on a rolling basis between July 10 and October 1. SanDisk's production included two
 27 early versions of the SD card specification—the SD Specification 0.9 and the SD Simplified
 28 Specification 0.9—and sales data for an early MMC/SD card reader (the SDDR-33 reader) that

1 SanDisk sold in the United States back in 2001. Additional facts concerning these references
 2 were confirmed by SanDisk's Rule 30(b)(6) witness, whom HP deposed on October 7.
 3

4 Prior to taking discovery from SanDisk in this action, Defendants were not aware of the
 5 early versions of the SD Specification or SanDisk's SDDR-33 reader, despite having conducted
 6 extensive investigations into the existence of prior art. After discovering these new references and
 7 taking SanDisk's deposition, HP promptly coordinated with the other Defendants to update their
 8 joint invalidity contentions and prepare the instant motion for leave to amend. Defendants
 9 therefore have acted diligently both in obtaining the discovery and in seeking amendment of their
 10 invalidity contentions once the information was discovered and corroborated.

11 2. The SanDisk prior art is highly relevant to the asserted claims.

12 Defendants contend that each of the three SanDisk prior art references anticipate and/or
 13 render obvious all of the asserted claims. As a result, the SanDisk prior art is highly material, and
 14 it would be unjust under the circumstances if Defendants were prohibited from introducing this
 15 information.

16 3. Plaintiffs will not be prejudiced by addition of the references.

17 Defendants have faithfully fulfilled their discovery obligations relating to the SanDisk
 18 prior art. Upon receiving documents from SanDisk, HP promptly served them on the parties,
 19 including Plaintiffs. Plaintiffs have had the same access to the SanDisk prior art as Defendants
 20 and, consequently, have been on notice about the SanDisk prior art. Plaintiffs' counsel also
 21 attended the deposition of SanDisk and cross-examined SanDisk's witness on the significance of
 22 SanDisk's documents for over 2 1/2 hours.

23 Additionally, this case is still in the early stages. The Court has not yet issued a scheduling
 24 order that sets forth deadlines for the close of fact and expert discovery. The only deposition
 25 taken so far in this action has been that of SanDisk. Plaintiffs therefore will have substantial
 26 opportunity to pursue discovery and develop a response to Defendants' contentions. Because
 27 Defendants seek to add the SanDisk prior art at such an early stage in the proceedings with no
 28 suggestion of gamesmanship, there is no prejudice to Plaintiffs. *GeoTag, Inc. v. Zoosk, Inc.*, No.

1 C 13-0217, 2013 U.S. Dist. LEXIS 115830, *2 (N.D. Cal. Aug. 15, 2013).

2 **B. Good Cause Exists to Add the Proposed Section 112 Challenges.**

3 In its September 18, 2015 order, this Court construed the disputed terms including “means
4 for mapping,” “means for [identifying/determining] the type of memory card inserted into said
5 port,” and “type of memory media card.” (Case No. 4:14-cv-03640, Dkt. No. 334.) With respect
6 to “means for mapping,” the Defendants argued that the term was indefinite because the
7 corresponding structure was a controller but no algorithm was disclosed. While the Court agreed
8 that the corresponding structure was a controller, the Court, relying on Plaintiffs’ expert’s
9 declaration, stated that the controller was not limited to a programmable controller and could be a
10 non-programmable controller as well. The specification, however, has no disclosure of a non-
11 programmable controller capable for performing the recited function. Thus, the Court’s
12 construction raises new invalidity issues not presented under Defendants’ proposed construction.
13 In light of this, Defendants have good cause to amend their invalidity contentions at this time to
14 add an additional 35 U.S.C. 112, ¶ 1 challenge to the relevant claims.

15 With respect to “means for identifying/determining the type of memory media card,”
16 although the Court adopted Defendants’ proposed construction that the structure was a “controller
17 with card detect lines,” the Court did not adopt Defendants’ further limitation that MMC/SD
18 cards be construed as a single “type of memory media card” for purposes of the claims. The
19 specification, however, contains no disclosure of how to identify an SD card or an MMC card
20 using a “controller with card detect lines.” Thus, the Court’s construction raises new invalidity
21 issues not presented under Defendants’ proposed construction. In light of this, Defendants have
22 good cause to amend their invalidity contentions at this time to add an additional 35 U.S.C. 112, ¶
23 1 challenge to the relevant claims.

24 Inasmuch as Defendants’ instant motion for leave to include these new written description
25 and enablement challenges is being filed within days of Plaintiffs’ counterpart motion for leave to
26 amend its infringement contentions, Defendants’ motion is timely.

27 Finally, allowing the amendment at this time will not prejudice Plaintiffs. As discussed
28

1 above, this action is still in its early stages, and Plaintiffs have adequate time to evaluate the new
2 bases and have its expert opine on Defendants' § 112 challenges prior to the close of fact and
3 expert discovery.

4 **V. CONCLUSION**

5 For the foregoing reasons, Defendants respectfully request that the Court grant Defendants
6 leave to amend their invalidity contentions.

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1 Dated: October 27, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on all counsel for all parties of record on October 28, 2015 via the Court's CM/ECF system.

/s/ Gordon M. Fauth